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Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOSE MENDOZA-LOPEZ AND ANGEL LANDEROS-QUINONES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL LAWYERS GUILD

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The ACLU has long been actively involved in issues concerning immigration law and the rights of aliens. In particular, the Immigration and Aliens' Rights Task Force of the ACLU is concerned with the application of due process and equal protection safeguards to aliens and immigrants.

The National Immigration Project of the National Lawyers Guild is

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

a national organization engaged in immigration and nationality law projects of public and social concern which promote the fair and humane administration of justice relating to immigration, nationality and refugee law, insure the fair and equal application and adjudication of the policies and programs related thereto, and facilitate the meaningful exercise of civil and constitutional rights regardless of race, religion, nationality or economic position.

SUMMARY OF ARGUMENT

The text of 8 U.S.C. § 1326 is ambiguous on its face. Accordingly, Section 1326 must be construed with reference to its legislative history, which reveals that Congress intended to allow individuals in Section 1326 criminal proceedings to collaterally attack an underlying deportation order. The sev-

eral statutory provisions sanctioning reentry in effect prior to the enactment of Section 1326 were held to allow such challenges to an underlying deportation order, and Congress incorporated the language of one of these prior provisions into Section 1326. When Congress adopts the language of a prior law without comment, Congress is presumed to know and to adopt the interpretations given that law.

Nothing in the legislative history of 8 U.S.C. § 1105a suggests that Section 1105a might preclude collateral attack in proceedings arising from reentry under Section 1326. Through Section 1105a, Congress intended to expedite deportation proceedings. Reentry was outside the scope of the statute. Moreover, since collateral attack on deportation orders is allowed in criminal proceedings under 8 U.S.C. § 1252(d) and (e)

and in civil proceedings under 8 U.S.C. § 1253, barring such a challenge under Section 1326 would be anomalous.

As the legislative history shows, a criminal conviction under Section 1326 must rest upon a previous lawful deportation. Without this predicate, the subsequent criminal prosecution would violate due process by imposing criminal sanctions as the result of an initial proceeding conducted without the proper constitutional safeguards. Where the determination of the initial proceeding is unreliable -- because it was reached without the safeguards required in a criminal trial or because an alien had no meaningful opportunity to challenge its validity -- it cannot be used in a subsequent criminal proceeding as a substitute for proving a material element of the crime charged.

Only in a few instances has this Court barred a challenge to the validity of the predicate finding in a criminal proceeding: either where the constitutional problem has been cured by permitting the litigant an adequate opportunity to appeal the decision or where Congress has unambiguously indicated that the subsequent conviction depends only on the fact, not the reliability, of the predicate determination. Where, as here, there is neither an adequate opportunity to appeal nor an unambiguous indication by Congress, the Constitution requires that an alien in a criminal prosecution be permitted to challenge the validity of the underlying deportation order.

ARGUMENT

POINT I

CONGRESS DID NOT INTEND TO PROHIBIT COLLATERAL ATTACK ON DEPORTATION ORDERS IN SECTION 1326 CRIMINAL PROSECUTIONS

Section 1326 of Title 8, United States Code, is a criminal statute which makes unauthorized reentry into the United States by an alien who has been deported within the preceding five years a felony. The language of Section 1326 is ambiguous on its face. The statute does not state whether the "deportation" element of the crime of reentry is satisfied by any deportation, however unlawful, or whether the statute applies only to aliens who reenter without permission after a lawful deportation. Because of the law's facial ambiguity, this Court's inquiry must go beyond the words of the

statute. Blum v. Stenson, 465 U.S. 886, 896 (1984).

The legal principles that guide the Court's inquiry are familiar. As a criminal statute, Section 1326 must be narrowly construed. Dowling v. United States, 105 S. Ct. 3127, 3131-32 (1985); United States v. Campos-Serrano, 404 U.S. 293, 297 (1971); United States v. Laub, 385 U.S. 475, 480 (1967). See generally W. La Fave & A. Scott, Handbook on Criminal Law 72-73 (1972). Similarly, as a law concerning deportation, the statute's interpretation must be limited to "the narrowest of several possible meanings of the words used." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). See INS v. Errico, 385 U.S. 214, 225 (1966); Bonetti v. Rogers, 356 U.S. 691, 699-700 (1958); Barber v. Gonzales, 347 U.S. 637, 640-641 (1954). Section 1326 cannot, moreover,

be construed in a vacuum, but must be read in light of the legislative history which explains its origins and the statutory scheme of which it is a part. United States v. Morton, 467 U.S. 822, 828 (1984); Watt v. Alaska, 451 U.S. 259, 266-267 (1981).

A careful review of these sources -- and the relevant case law interpreting Section 1326's predecessor statutes -- confirms that Congress did not intend to preclude a defendant in a Section 1326 prosecution from challenging the validity of the predicate deportation order.

A. The Earlier Statutory Provisions From Which Section 1326 Evolved Permitted Collateral Attack

Unauthorized reentry following deportation was first made a felony by the Immigration Act of 1929, 8 U.S.C. § 180 (repealed 1952), that extended the

crime to "any alien . . . arrested and deported in pursuance of law."[2] In addition, Section 180 provided the civil penalty of deportation for any alien previously deported. Section 180 was not, however, the only statutory provision in effect prior to Section 1326 which addressed unauthorized reentry of a previously deported alien. Section 155 of Title 8, United States Code, enacted in 1917, provided that

> any alien who, after being excluded and deported or arrested and deported [in connection with prostitution] shall return to and enter the United States [within five years] . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

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[2] The impetus for the 1929 legislation was Congress' desire to deter reentry of deported aliens. S. Rep. No. 1456, 70th Cong., 2d Sess. (1929); H.R. Rep. No. 484, 70th Cong., 1st Sess. 19-20 (1928).

8 U.S.C. § 155 (repealed 1952; emphasis added). Similarly, 8 U.S.C. § 137 (repealed 1952), enacted in 1918, extended felony sanctions to reentering aliens initially deported as radicals.[3] Finally, Section 138 of the Immigration Act of 1917 provided the penalty of a misdemeanor conviction for any reentering alien previously deported "in pursuance of the provisions of this Act" as a prostitute, procurer or other immoral person. 8 U.S.C. § 138 (repealed 1952).

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[3] Section 137 provided in relevant part that "any alien who shall, after he has been excluded and deported or arrested and deported in pursuance of the provisions of this Act, thereafter return to or enter the United States or attempt to return to or enter the United States shall be deemed guilty of a felony." 8 U.S.C. § 137. There are no reported cases arising under the reentry provision of 8 U.S.C. § 137.

Thus, from at least 1917 to 1952, there were several provisions of immigration law providing for the criminal prosecution or civil deportation of aliens who, after being deported, reentered the United States without authorization. Each provision contained slightly different language to describe the predicate deportation order giving rise to the criminal or civil penalties. Compare Section 180 ("deported in pursuance of law") with Section 155 ("excluded and deported or arrested and deported") and Sections 137 and 138 (deported "in pursuance of the provisions of this Act").

In 1952, Congress repealed these provisions and enacted a single felony reentry statute, Section 1326. In doing so, Congress did not carefully delete "in pursuance of law" from Section

180 to create the current Section 1326. Rather, Congress chose language nearly identical to that of Section 155 without indicating any intent to change or modify then-existing practice, which had permitted collateral attack under Sections 180, 155 and 138, despite their different verbal formulations (and despite the absence of "in pursuance of law" from Section 155).

The case law allowing collateral attack under the predecessor statutes to Section 1326 is considerable. In one of the few reported criminal reentry cases prior to the enactment of Section 1326, an alien prosecuted under Section 138 was allowed to challenge the validity of her underlying warrant of deportation. Mills v. United States, 273 F. 625, 626 (9th Cir. 1921). Similarly, in deportation proceedings pursuant to Sections 180

and 155, arising from unauthorized reentry, both courts and administrative agencies permitted collateral attack of a previous deportation order when there was "a gross miscarriage of justice in the former proceedings." United States ex rel. Rubio v. Jordan, 190 F.2d 573, 576 (7th Cir. 1951). See United States ex rel. Beck v. Neely, 202 F.2d 221, 223 (7th Cir.), cert. denied, 345 U.S. 997 (1953) (allowing collateral attack on deportation under Section 155); United States ex rel. Steffner v. Carmichael, 183 F.2d 19, 20 (5th Cir.), cert. denied sub nom. Steffner v. Savoretti, 340 U.S. 829 (1950) (deportation for reentry upheld under Section 155 after examination of prior deportation proceedings); United States ex rel. Bartsch v. Watkins, 175 F.2d 245, 247 (2d Cir. 1949) (collateral attack under Section 180 denied after

preliminary inquiry on merits)[4]; In re P, 3 I. & N. Dec. 818, 819 (BIA 1949) (reviewing underlying deportation proceeding to determine if prior proceeding was "in pursuance of law").[5]

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[4] To the extent that the decision in United States ex rel. Koehler v. Corsi, 60 F.2d 123 (2d Cir. 1932) suggests that collateral attack was not available in deportation proceedings under Section 180, its conclusions and reasoning have been superseded by subsequent decisions. The case was decided in 1932, only three years after the enactment of Section 180. The court purported to reject collateral attack solely on the basis of its own reasoning -- set out in four sentences -- without reference to analogous provisions or legislative history. Though Koehler has been subsequently cited for the dicta therein, its holding has been ignored in more recent decisions. See, e.g., United States ex rel. Bartsch v. Watkins, 175 F.2d 245, 247 (2d Cir. 1949).

[5] The explicit concern for due process enunciated by courts considering initial deportations and anticipating the effect of Section 180 on the deported alien further indicates substantial judicial sentiment that

(Footnote continued)

The rationale for restricting collateral attack at all was the desire to limit dilatory tactics in deportation proceedings, since "if in each subsequent case the validity of the previous deportation orders had to be determined, 'there would be no end to the proceedings

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(Footnote 5 continued from previous page) collateral attack should be available in a criminal proceeding under Section 180. See Browne v. Zurbrick, 45 F.2d 931, 932 (6th Cir. 1930) (by Section 180 "deportation becomes as to aliens who have established a domicile here a decree of perpetual banishment and exile -- regardless of fixed family and business ties and connections; and it more clearly carries a heavy burden of 'possible human woe.'"); United States ex rel. Barchi v. Day, 38 F.2d 815, 816 (S.D.N.Y. 1930) (asking immigration authorities at time of first deportation "to ameliorate the strict rule of [Section 180]," in later proceedings, since alien was deported "either through ignorance of our often changed immigration laws, or in pursuance of poor advice").

cast upon administrative agencies.'" Rubio, 190 F.2d at 576 (quoting Steffner, 183 F.2d at 20). This objection -- the problem of indefinitely delayed deportation -- is irrelevant in the criminal context, where the proceeding results in a felony conviction rather than a deportation. Further, the deterrent purpose of the felony provision would not be affected by allowing collateral challenges in some cases, since the reentering alien would still face the prospect of criminal prosecution and incarceration upon reentry. See Note, Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry, 48 U. Chi. L. Rev. 83, 98-99 (1981) (citing McKart v. United States, 395 U.S. 185, 199-200

(1969)).[6] At least the same degree of collateral inquiry must be permitted in a criminal prosecution where the stakes and the commensurate due process protections are far greater.

Thus, Section 1326 was drafted in 1952 against a background that permitted an alien in proceedings under Sections 180, 155, and 138 to challenge the validity of the underlying deportation order in a subsequent proceeding predicated on an earlier deportation. Absent evidence to the contrary, these

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[6] An additional concern about the impact of allowing collateral attack in deportation proceedings raised in Steffner was the age of the underlying deportation proceeding at issue in the subsequent case. The court found, however, that this consideration constituted a factor weighing on the merits of a collateral attack rather than precluding such attack. Steffner, 183 F.2d at 21.

established principles are incorporated into current law.

B. Congress Did Not Intend To Reject Existing Law Allowing Collateral Attack

The legislature, in the enactment of a statute, will not be presumed to intend to overturn long-established legal principles, unless such intention clearly appears by express declarations or by necessary implication. Lorillard v. Pons, 434 U.S. 575, 581 (1978); Muniz v. Hoffman, 422 U.S. 454, 469-70 (1975).

In 1952, Congress repealed Sections 137, 138, 155 and 180 and enacted a comprehensive revision of existing immigration law. The preliminary analysis of the proposed revisions began in 1950, with the Senate Committee on the Judiciary's lengthy report on the state of immigration in this country. S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

After summarizing the criminal provisions relevant to reentering aliens, id. at 646-47, the Committee commented briefly on the need to correlate Sections 137, 138 and 180: "It was suggested that one [reentry] act would suffice for all persons who have been deported, regardless of the reason therefor, and that the present act of March 4, 1929 [Section 180], should be reenacted to cover any and all deportations." Id. at 655 (emphasis added). The Committee concluded with the recommendation that "with a few exceptions all of the penalties both judicial and administrative, be substantially reenacted." Id. at 656 (emphasis added). The only change recommended in the reentry sections was that "[t]he provisions relating to reentry after deportation should be carried forward in one section and apply to any alien de-

ported for any reason and provide the same penalty." Id.

There is no evidence in the legislative history of the 1952 Act that Congress intended to reject the Committee's considered recommendation that existing law "be substantially reenacted," with only superficial changes to consolidate the reentry provisions. Indeed, the 1950 Report was generally relied upon during the drafting of the final bill. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27, reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1678 (parts of 1950 Committee Report incorporated into final report). See Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 202 (1980) (noting relevance of congressional materials to understanding of final legislation).

The absence of the phrase "in pursuance of law" in Section 1326 is thus the incidental result of Congress' consolidation of Section 137, 138 and 180, rather than a substantive change. In fact, Section 1326 tracks the language of Section 155, which sanctioned reentry of "any alien . . . after being excluded and deported or arrested and deported as a prostitute," 8 U.S.C. § 155 (emphasis added), and which had been construed to permit a collateral challenge to the underlying deportation order at the time of the subsequent proceedings related to illegal reentry. In consolidating the reentry sections of the prior law at 8 U.S.C. § 1326, Congressional drafters simply used the more succinct language of Section 155 for the new felony provision. The legislative evidence thus compels the conclusion that Congress intended to

preserve the prevailing interpretations of Sections 138, 155 and 180 in the new consolidated Section 1326. See Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection, 106 S. Ct. 755, 759-60 (1986) (if Congress intends to change judicial interpretation of statute, it makes that intent specific).

C. The Legislative History Of Section 1105a Does Not Evidence Any Congressional Intent To Bar Collateral Attack In Section 1326 Proceedings

Section 1105a of the Immigration and Nationality Act was enacted to provide for prompt judicial review of deportation and exclusion orders. The provision bears no relation to Section 1326 and the legislative history confirms that Congress evidenced no intent for any provision of Section 1105a to affect Section 1326 proceedings. Section 1105a was added to Title 8 in 1961, and pro-

vides that the procedures for judicial review prescribed therein "shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation." 8 U.S.C. § 1105a.[7]

Congress' explicit goal in passing Section 1105a was to expedite deportation by preventing successive petitions for review of deportation and exclusion orders. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23, reprinted in

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[7] The phrase "sole and exclusive" limits direct review of deportation orders to appeals provided in Section 1105a and habeas corpus appeal proceedings. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 21-22, reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2967-68; Note, Deportation and Exclusion, 71 Yale L.J. 760, 760-66 (1962). "Sole and exclusive" in § 1105a also clarifies that the Administrative Procedure Act was no longer pertinent to immigration proceedings. C. Gordon & H. Rosenfield, Immigration Law & Procedure, § 8.9Ab n.25 (1986).

1961 U.S. Code Cong. & Ad. News 2950, 2967; H.R. Rep. No. 565, 87th Cong., 1st Sess. 1 (1961). See Cheng Fan Kwok v. INS, 392 U.S. 206, 214 (1968); Foti v. INS, 375 U.S. 217, 226 (1963); Note, Deportation and Exclusion, 71 Yale L.J. 760, 760-62 (1962). The legislative history of the 1961 Act evinces no Congressional intent to extend the provisions of Section 1105a beyond the narrow question at hand, i.e., the speedy deportation of deportable aliens.

Given the purpose of Section 1105a to streamline the deportation process, the absence of any reference to Section 1326 in Section 1105a is of no moment. The 1961 Act addresses only those challenges to deportation orders that arise in the context of deportation, or in the context of effectuating the physical removal of an alien from the

country. Since Section 1252 (d) and (e) relate to aliens who willfully fail to depart from the United States after having been ordered deported, or who willfully violate the terms of supervision following the entry of a deportation order, that section is tangentially related to the concerns that prompted Section 1105a. Section 1326, in contrast, is concerned not with expediting deportation, but with deterring reentry.[8]

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[8] Likewise, Section 1105a(c) does not apply to the criminal context raised in this case. Section 1105a(c), which excludes from review the deportation orders of aliens who have departed from the country after issuance of a deportation or exclusion order, resulted from Congress' concern with the judicially-created action for declaratory judgment available to an alien who was outside the United States. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 30-33, reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2974-77 (1961 Act restoring law to position it occupied until Supreme Court deci-

(Footnote continued)

Accordingly, the explicit preservation of collateral review in Section 1252 proceedings is particularly noteworthy. Subsection 6 of Section 1105a(a) simply confirms that defenses to criminal prosecutions did not constitute an issue that Congress felt was a problem. Instead, Congress made explicit that the importance of allowing collateral attack

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(Footnote 8 continued from previous page) sion in Brownell v. We Shung, 352 U.S. 180 (1956)). As with the other provisions of Section 1105a, subsection (c) is directed toward speedy resolution of deportation proceedings -- it bars an excluded alien's attempt to pursue direct review from outside the United States -- and has no bearing on a criminal prosecution for reentry. See Note, Deportation and Exclusion, 71 Yale L.J. 760, 788 (1962). Indeed, subsection (c) states that in some cases "the validity of the [deportation] order [will be] previously determined in [a] civil or criminal proceeding." 8 U.S.C. § 1105a(c) (emphasis added).

in a Section 1252 prosecution was unrelated to the interest in expeditious deportation. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 27-28, reprinted in 1961 U.S. Code Cong & Ad. News 2950, 2970-2971 (need for expedition, yet in criminal proceeding, alien may question validity of deportation order). Thus, the provisions of Section 1105a, which arose in a different context and which confirm the importance of allowing collateral attack in criminal prosecutions, do not constitute a basis for imputing to Congress the intent to modify or restrict the defenses in a Section 1326 prosecution.

In addition, in light of the permissibility of collateral attack under Section 1252 (d) and (e), establishing a different standard in Section 1326 prosecutions would be inconsistent with the

structure of the immigration laws and would create an unintended anomaly. There is no reason to treat criminal proceedings under Sectior. 1326 differently from criminal proceedings arising under Section 1252. The explicit provision for collateral attack under Section 1252 indicates the importance Congress attached to providing such a defense where the government chooses to prosecute rather than deport an alien who has reentered the United States.

Moreover, collateral attack of deportation orders is allowed in other contexts as well. For example, a carrier fined under 8 U.S.C. § 1323 for transporting an alien illegally may present evidence tending to impeach the administrative order excluding the alien in question. In re S.S. Ryndam, 10 I. & N. Dec. 240, 248 (BIA 1963). In addition,

under 8 U.S.C. § 1253 a carrier may contest whether the cause for deportation existed at entry. United States v. Holland-America Line, 231 F.2d 373 (2d Cir. 1956) (carrier challenging fine levied under 8 U.S.C. § 1253); United States v. Prince Line, Ltd., 189 F.2d 386 (2d Cir. 1951) (carrier challenging fine levied under 8 U.S.C. § 156 (current version at 8 U.S.C. § 1253)).

Furthermore, under either statute, the deportation proceedings may have been conducted years before the collateral challenge is ripe. For example, an alien may be supervised under 8 U.S.C. § 1252(e) for many years before he or she violates the requirements of supervision. See, e.g., Dymytryshyn v. Esperdy, 285 F. Supp. 507, 509 (S.D.N.Y.), aff'd, 393 U.S. 77 (1968) (aliens under supervision for more than ten years); Berger v.

Heckler, 771 F.2d 1556, 1559 (2d Cir. 1985) (alien under order of supervision for ten years). In addition, in Section 1252 and Section 1326 proceedings, collateral challenges to the validity of the underlying deportation order have the same effect on judicial efficiency.

Thus, it would be inconsistent with analogous provisions of the immigration laws as well as contrary to well-established principles governing the construction of criminal statutes to interpret Section 1326 so as to deny a criminal defendant prosecuted under that section the affirmative defense that is available to such defendant in every other prosecution where a prior deportation order is a material element of the crime. Accordingly, collateral attack of underlying deportation orders should be

permitted in proceedings under 8 U.S.C. § 1326.

POINT II

PRECLUDING AN ALIEN IN A SECTION 1326 PROSECUTION FROM EVER CHALLENGING THE VALIDITY OF THE UNDERLYING DEPORTATION ORDER VIOLATES DUE PROCESS

The legislative history of Section 1326 shows that a criminal conviction under this section must rest upon a previous lawful deportation. Without this predicate, the subsequent criminal prosecution violates the due process clause. This Court has noted, in other cases, the rationale for limiting the conclusive use of a previous determination in a criminal proceeding: the constitutional safeguards required in a criminal prosecution ensure that the result is a reliable indicator of the defendant's guilt. Lewis v. United States, 445 U.S. 55, 67 (1980). But

where a determination of guilt or civil liability lacks such indicia of reliability, the earlier determination cannot be used in a subsequent criminal proceeding as a substitute for proving a material element of the crime charged. The first determination may be untrustworthy because it is reached without the safeguards required in a criminal trial, see, e.g., Baldasar v. Illinois, 446 U.S. 222 (1980); Loper v. Beto, 405 U.S. 473 (1972); United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967); or because the defendant had no opportunity to challenge its validity. See Yakus v. United States, 321 U.S. 414, 446 (1943). Only in the rare instance where Congress has clearly indicated that the subsequent conviction depends only on the fact, not the reliability, of the predicate determination has this Court

barred collateral attack. Where, as here, there is no such unambiguous indication, the Constitution requires that an alien in a criminal prosecution be permitted to question the validity of the underlying deportation order.

A. This Court Has Expressed Grave Concern About The Constitutionality Of Using An Administrative Finding Of Deportability In A Criminal Proceeding

This Court first discussed whether the Constitution permits an administrative determination of deportability to be used conclusively in a subsequent criminal proceeding in United States v. Spector, 343 U.S. 169 (1952). Justice Douglas, writing for the Court, neither reached nor foreclosed the constitutional question, id. at 172, while Justices Jackson and Frankfurter who did discuss the issue found it im-

proper to make the predicate deportation order the basis of criminal sanctions where "[t]he adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime."[9] Id. at 178. The Justices noted the unfairness of subjecting the alien to a deportation proceeding that is "exclusively civil in nature, with no criminal consequences or connotations," id. at 178, and then using that "deportation [order as] conclusive evidence of his unlawful presence . . . [without permit-

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[9] Justice Black in his separate dissent noted that because he had found the statute void for vagueness he did not need to discuss the issue; but he observed, citing his own opinion, that he had not "yet seen a satisfactory reason for rejecting [Justice Jackson's] view." Id. at 174 n.2.

ting any] inquiry into the correctness or validity of the order." Id. at 177.

1. The Result Of Even A Constitutionally Proper Civil Proceeding May Not Be The Basis For Later Criminal Penalties

Justices Jackson and Frankfurter were troubled that a civil proceeding could result in criminal sanctions, especially when there was some question as to the validity of the initial determination. This Court has also observed that even when that first proceeding is properly conducted, it cannot provide the basis for subsequent criminal penalties unless the constitutional protections provided are sufficient for sixth amendment purposes. In Baldasar v. Illinois, 446 U.S. 222 (1980), the Court held that an uncounseled midemeanor conviction could not be used to convert a

subsequent misdemeanor into a felony with a prison term.

In the concurring Baldasar opinion, which was adopted in the per curiam decision, Justice Stewart, joined by Justices Brennan and Stevens, found the imprisonment constitutionally impermissible because Baldasar was subjected to criminal sanctions on the basis of a misdemeanor proceeding in which he was without the constitutional safeguards that would have been required in a criminal trial. "The sentence [Baldasar] actually received would not have been authorized by statute but for the previous conviction. It was imposed as a direct consequence of the uncounseled conviction and is therefore forbidden." Id. at 228.

As in Baldasar, an alien does not receive appointed counsel in the

initial proceeding. But also as in Baldasar, an alien is subject to criminal sanctions under Section 1326 as a direct result of the first uncounseled hearing. As the concurrence stated in Baldasar, "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our cases." Id. at 228-29.

For several reasons this central constitutional concern expressed first in Spector and echoed in Baldasar -- that criminal penalties not be imposed on the basis of a determination made without proper safeguards -- is not cured by the direct review provisions of Section 1105a or the alternative remedies set forth in Section 1326.

The problem articulated in Spector was not the consequence of the absence of any judicial or administrative review procedures available at that time. While there was some dispute at the time Spector was decided as to the applicability of the Administrative Procedure Act, id. at 179, this Court noted in Heikkila v. Barber, 345 U.S. 229, 234 (1953) that the writ of habeas corpus was available to challenge an order of deportation. In the face of both present and possible remedies, the Spector Justices nonetheless found constitutionally deficient the practice of using a determination of deportability -- made without due process safeguards -- as conclusive in a criminal proceeding.

The provision of Section 1326 that permits a deported alien to apply to the Attorney General, from outside the

country, for permission to reenter the United States after being deported likewise does not cure the constitutional defect of § 1326. Even if an alien knows to make such application, see Point II.A.2, infra, Immigration and Naturalization Service ("INS") procedures do not contemplate the Attorney General reviewing the underlying validity of the deportation order as a basis for determining admissibility.

The procedure provided by the agency to apply for permission to reenter pursuant to Section 1326 is through INS Form I-212, a copy of which is reproduced in the Addendum, attached hereto. This form only asks the applicant to state his "[r]easons for desiring to enter the United States." The INS Commissioner has ruled that the factors governing whether consent is to be

granted are equitable: the applicant's moral character, the recency of his deportation, whether his services are needed in the United States and his length of residence here. In re Lee, 17 I. & N. Dec. 275 (BIA 1978). Thus, there is no evidence that due process violations would even be considered by the Attorney General in a Section 1326 application, and an uncounseled applicant would have no way of knowing whether such due process issues might be raised.

Finally, the remedy of direct administrative or judicial review of a deportation order does not provide, in operation, an opportunity for review that is sufficiently reliable to permit the imposition of criminal sanctions on an uncounseled alien. Even a counseled alien, well aware of the process of appeal, risks the summary dismissal of his

case should he not articulate the grounds for his appeal with the requisite specificity. 8 C.F.R. §3.1(d) (1-A). See also Townsend v. INS, 799 F.2d 179, 182 n.2 (5th Cir. 1986) (noting "harshness" of result, court affirmed Board's dismissal of asylum applicant's appeal from deportation order since alien did not precisely indicate reason for appeal on the INS form); In re Valencia, Int. Dec. 3006 (BIA 1986) (dismissing appeal where reason for appeal not given with specificity). Thus, an alien ordered deported in a mass hearing without counsel is not in a position to exercise meaningfully his right to administrative or judicial review. See Point II.A.2. infra.

2. There Must Be An "Adequate" Opportunity For Review Of A Civil Proceeding Before It May Constitutionally Result In Criminal Sanctions

As this Court has found, in the absence of a meaningful opportunity to appeal the administrative decision, collateral attack in a subsequent criminal proceeding cannot be barred. Yakus v. United States, 321 U.S. 414 (1943). Although the Yakus Court was compelled by the facts to forbid a collateral challenge to the validity of a civil determination, Yakus reached that conclusion only once it determined that petitioners had already been given an "adequate" opportunity for review of the civil proceeding. The Court measured the adequacy of that review not merely by its existence in theory but by its availability in fact.

The petitioners in Yakus were convicted on criminal charges after an administrative tribunal had found that they had violated the price limits established by the Office of Price Administration during World War II. When the petitioners attempted to attack collaterally the administrative decision in the subsequent criminal prosecution, without first having exhausted the exclusive civil appeals route provided, the Court held that due process did not compel permitting petitioners to do so.

The Court in Yakus was careful to limit its holding, and indicated that collateral attack was required where by "statutory command or in operation [the appeals process] will deny, to those charged with violations, an adequate opportunity to be heard." Id. at 446 (emphasis added). Because the petition-

ers in Yakus had not made any showing "that the statute withholds judicial remedies adequate to protect [their] rights," id. at 434, or advanced any reason why they could not exhaust, id. at 437, the Court barred collateral attack.[10]

In contrast to the petitioners in Yakus who were businessmen with well-defined commercial interests and the

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[10] The limits on the government's ability to use an agency determination as conclusive proof of an element of a criminal offense has been noted in other contexts as well. In Estep v. United States, 327 U.S. 114 (1946), this Court protested against the use in a criminal proceeding of an agency determination that had been previously made without constitutional protections. "We are loath to believe that Congress reduced criminal trials under the [Selective Training and Service] Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." Id. at 122.

knowledge, resources and counsel to defend those interests, aliens in deportation proceedings often appear without the benefit of counsel or representation of any kind and do not engage in a calculated tactical choice.[11] Aliens typi-

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[11] The Government's reliance on Walker v. Birmingham, 388 U.S. 307 (1967) is similarly misplaced. The issue facing the Court as well as the characteristics of the litigants were fundamentally different than those here. In Walker a group of black ministers had scheduled demonstrations against the city's segregation laws. In the face of an injunction prohibiting the march without first obtaining a permit, the organizers nonetheless held a demonstration. Facing the Court was a fundamental question of how to protect the integrity of the judicial process and the efficacy of its power if it permitted the injunction to be violated. Without coercive means to enforce its will, only steadfast insistence upon obedience to judicial orders could ensure the courts' continued ability to adjudicate disputes definitively. Here, by contrast, the Court faces the question of the proper protection for a criminal defendant. The min-

(Footnote continued)

cally are not able to pursue judicial remedies due to ignorance, indigency or intimidation.

The judicial record and scholarly commentary on both the nature of immigration proceedings, as well as the particular disabilities that handicap the persons who are the subjects of those hearings, indicate that aliens are severely disadvantaged in deportation proceedings. Aliens face laws and a bureaucracy that courts and commentators alike have condemned as "labyrinthine,"

(Footnote 11 continued from previous page)
isters, unlike the respondents here, were making a conscious and strategic choice. Here, respondents did not have the understanding of the intricacies of the proceedings that would have allowed them to make an intelligent and knowing choice. These are hardly the circumstances that permit the "adequate opportunity" for appeal that Yakus required.

Corniel-Rodriguez v. INS, 532 F.2d 301, 304 (2d Cir. 1976), and "a system of secret law." K. Davis, Administrative Law 86 (2d ed. 1965); and the opaqueness of the proceeding in which aliens find themselves is further aggravated by the all-too-frequent failure of immigration officials to provide sufficient notice to the aliens of their rights or opportunities for relief. See, e.g., Duran v. INS, 756 F.2d 1338, 1341 (9th Cir. 1985); Villegas v. INS, 745 F.2d 950, 951 (5th Cir. 1984); Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979).

Other practices present in the instant case are not unique, as a review of recent judicial decisions reveals. For example, the difficulty of obtaining an adequate hearing when the proceeding is conducted en masse was recognized in United States v. Calles-Pineda, 627 F.2d

976, 977 (9th Cir. 1980); the unfairness of having claims adjudicated without the assistance of a competent translator was held to be a violation of due process in Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984); and the disorientation and interference with statutory rights that may result from transferring aliens from one detention site to another was condemned in Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985). A deportation order issued under the circumstances described in these cases lacks the indicia of reliability that this Court has required before permitting such a proceeding to form the basis for criminal sanctions.

B. This Court Has Barred Collateral Attack Only Where Congress Explicitly Intended To Impose Criminal Sanctions Based On The Mere Fact Of A Predicate Act

In Lewis v. United States, 445 U.S. 55 (1980), the Court interpreted a provision of the Omnibus Crime Control and Safe Streets Act of 1968 that imposed criminal sanctions on a felon for possession of a firearm. In deciding whether the validity of the underlying felony conviction could be collaterally attacked, the Court looked specifically at the legislative history of the statute. The Court held that Congress had clearly intended that the fact, not the reliability, of the predicate conviction was sufficient for criminal liability. This conclusion was based on lengthy and explicit evidence of Congressional intent which stands in stark contrast to the

contrary legislative history of the statute before the Court in the instant case. See Point I, supra.

The Court explicitly distinguished its holdings from those predecessor cases that had permitted collateral attack on an unconstitutional predicate conviction[12]. As the Court in Lewis pointed out, in those cases "this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended on the reliability of a past uncounseled conviction." Lewis v.

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[12] Loper v. Beto, 405 U.S. 473 (1972) (uncounseled conviction cannot be used to impeach the general credibility of a witness); United States v. Tucker, 404 U.S. 443 (1972) (previous conviction cannot be used to determine the sentence in a subsequent one); Burgett v. Texas, 389 U.S. 109 (1967) (an uncounseled conviction cannot be used for enhancement of punishment under a State's recidivist statute).

United States, 445 U.S. at 67. By contrast, the legislative history of the statute at issue in Lewis made clear that the "mere fact of conviction, or even indictment" was sufficient for liability. Id.

The Court itself explained that the result in Lewis as compelled by the "obvious breadth" of the statutory language as well as by Congress' "expansive legislative approach," id. at 61, in providing "a sweeping prophylaxis, in simple terms, against misuse of firearms." Id. at 63. Indeed, so sweeping was the statute that its prohibitions against firearms possession applied even to those individuals who had merely been indicted for a felony. Id. at 64. Since the mere taint of an indictment was deemed a sufficient predicate by Congress, the Court concluded that the leg-

islature had intended the statute's prohibitions to embrace even those whom the Government had only probable cause to believe had committed a felony. The Court concluded that such a sweeping intent was the consequence of the unique events, "political assassinations, riots and other violent crimes involving firearms that occurred in this country in the 1960's," which precipitated the passage of the provision at issue in Lewis. Id. at 63.[13]

The decisions that have succeeded Lewis have acknowledged, implic-

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[13] Key among those events was the murder of Dr. Martin Luther King, Markham v. United States Dept. of Treasury, 594 F. Supp. 9, 11 (E.D. Mich. 1983), aff'd, 743 F.2d 397 (6th Cir. 1984), citing legislative history contained in Stevens v. United States, 440 F.2d 144, Appendix A at 152-158 (6th Cir. 1971).

itly or explicitly, that case's singular outcome.[14] Baldasar, for example, decided only four months after Lewis, does not mention Lewis even though it also

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[14] Even if Lewis could be accepted as the articulation of a general rule, the fundamentally different postures in which the defendant there and the aliens here find themselves must show such a rule's inapplicability in this context. A previously convicted felon, such as the defendant in Lewis may collaterally attack in a habeas corpus proceeding the continuing effects of his unlawful conviction. An alien, by contrast, having unknowingly foregone his opportunity for review, is left with no meaningful avenue of appeal even should egregious due process violations be discovered. Ironically, the very flaws that the writ of habeas corpus remedies are just those suffered by aliens in deportation proceedings. As this Court stated, the writ: "extends . . . to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (emphasis added).

addresses the issue of collateral attack. The Court's substantive reliance on Lewis has been only for its explication of The Omnibus Crime Control and Safe Streets Act of 1968. See, e.g., Ball v. United States, 105 S. Ct. 1668, 1672 (1985); Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1982).

Following the rule most recently expressed in Baldasar, an alien subject to the criminal proceeding of Section 1326 must be permitted to challenge collaterally the validity of the initial deportation order. Baldasar would require this outcome even when the original proceeding was constitutionally proper. The issue, as explained by the Court, is not whether the first proceeding passes constitutional muster on its own, but rather whether the safeguards in that hearing are sufficient to permit the

deprivation of the individual's liberty in a later proceeding. For all the reasons that this Court found that the initial proceedings in Baldasar, Lopez, Burgett and Tucker too unreliable to determine conclusively a material element in a subsequent criminal proceeding, the deportation hearing also is too unreliable to constitute the grounds for a Section 1326 conviction.

Nothing in Lewis or Yakus is to the contrary. Rather, Lewis by its own words sets itself apart from the current jurisprudence of collateral attack, relying instead on the extraordinary legislative history and expansive and unambiguous Congressional intent in the Omnibus Crime Control and Safe Streets Act that is absent here, and Yakus bars collateral attack only where litigants had an adequate opportunity to appeal the first

proceeding -- an opportunity unavailable to aliens in deportation proceedings. Thus fundamental fairness requires that aliens in Section 1326 proceedings be permitted to challenge the validity of the underlying deportation order.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,*

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December 19, 1986

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ADDENDUM

U.S. Department of Justice
Immigration and Naturalization Service

Application for Permission to Reapply for Admission Into the United States After Deportation or Removal

OMB No. 1115-0099
Approval Expires 3-85

(To be filed in duplicate)

Read Instructions on Reverse

Date _____

Fee Stamp

I request permission to reapply for admission into the United States.

1. Name *(Last)* *(First)* *(Middle)*	2. File numbers on correspondence from U.S. Immigration Service *(if known)*
3. Name used when last deported or removed from the U.S.	4. Date of Birth
5. Other names used or known by	6. Place of Birth *(city or town; state or province; and country)*
7. Circumstances under which deported or removed from the United States *(check applicable blocks)* ☐ Excluded and deported *(less than one year ago)* ☐ Arrested and deported *(less than five years ago)* ☐ Removed after having fallen into distress *(less than five years ago)* ☐ Removed as alien enemy *(less than five years ago)* ☐ Removed at U.S. Government expense in lieu of deportation *(less than five years ago)*	8. Length of residence in the United States *(years)* 9. Place of residence at time of deportation or removal from United States *(city and state)* 10. Place Deportation Hearing held or application for removal made *(city)*
11. Country to which deported or removed	12. Detention facility or jail where detained *(city and state) (if not detained, write "None")*
13. Date of deportation or removal from United States	14. Port of Departure from United States
15. Status desired if permitted to re-enter United States ☐ Permanent Resident ☐ Visitor ☐ Student ☐ Other *(specify)*	16. Reasons for desiring to re-enter the United States
17. Location of American Consulate where application for visa will be made *(city and country)*	18. Name and relationship of United States citizen or lawful resident alien spouse, parent or children, if any
19. Signature of Applicant	20. Street and number; city or town; state or province; and country of present residence

SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

21. I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.

(Signature) (Address) (Date)

THIS SPACE FOR USE OF IMMIGRATION OFFICER

Decision

Date of Action

DD or OIC Office

Form I-212
(Rev. 5-5-83) N

RECEIVED	TRANS. IN	RET'D-TRANS. OUT	COMPLETED

BEST AVAILABLE COPY

INSTRUCTIONS

Submit application in duplicate.

PERSONS WHO ARE PERMITTED TO REAPPLY FOR ADMISSION WITHOUT FILING THIS APPLICATION

1. Persons who were excluded from admission and deported *more than one year ago.*
2. Persons who *voluntarily* departed from the United States without expense to the United States Government and without an order of deportation having been entered.
3. Persons who have been outside the United States for five successive years following their last deportation or removal.

WHERE TO SUBMIT APPLICATION

1. If you are abroad and intend to apply for an immigrant visa, submit the application to the District Director of the Immigration and Naturalization Service of the district in which your deportation proceedings were held, unless you are concurrently applying for a waiver of grounds of excludability under Section 212(g), (h), or (i) of the Immigration and Nationality Act, as amended. In the latter event, this application should be filed with the American Consul with whom you are also filing your application for a waiver of the grounds of excludability. If you are abroad and intend to apply to an American Consul for a nonimmigrant visa or a border crossing card, this application should be filed with the American Consul with whom you are also filing your application for nonimmigrant visa or border crossing card, if requested to do so by the Consul.

2. If you are at a port of entry into the United States, applying for admission into the United States, submit the application to the District Director of the Immigration and Naturalization Service having jurisdiction over that port:

3. If you are in the United States and will file an application for waiver under Section 212(g), (h), or (i) of the Immigration and Nationality Act with an American consul you should file this application and the application for the waiver simultaneously with the American consul. If you are in the United States and are applying for adjustment of your status under Section 245 of the Act, or are seeking to be granted advance permission to reapply prior to your departure from the United States, submit the application to the District Director of the Immigration and Naturalization Service having jurisdiction over the place where you are residing.

WHAT MUST ACCOMPANY YOUR APPLICATION

1. CORRESPONDENCE that you have in your possession relating to your deportation.

2. If you have listed any relative under Item 18 on the front, you must submit documentary evidence of your relationship to such person. In addition, if such person is a U.S. citizen, you must submit proof. If he/she is not a U.S. citizen, you must furnish such person's *full* name, date and place of birth and date and place of admission to the United States, and his/her Alien Registration number, if known.

3. If you wish, you may attach a statement giving the facts you believe the Immigration and Naturalization Service should consider in making a decision on your application, and you may attach any evidence in support of your statement.

4. Fee.

A fee of thirty-five dollars ($35) must be paid for filing this application. It cannot be refunded regardless of the action taken on the application. DO NOT MAIL CASH. ALL FEES MUST BE SUBMITTED IN THE EXACT AMOUNT. Payment by check or money order must be drawn on a bank or other institution located in the United States and be payable in United States currency. If you reside in Guam, check or money order must be payable to the "Treasurer, Guam." If you reside in the Virgin Islands, check or money order must be payable to the "Commissioner of Finance of the Virgin Islands." All other applicants must make the check or money order payable to the "Immigration and Naturalization Service." When check is drawn on account of a person other than yourself, your name must be entered on the face of the check. If application is submitted from outside of the United States, remittance may be made by bank international money order or foreign draft drawn on a financial institution in the United States and payable to the Immigration and Naturalization Service in United States currency. Personal checks are accepted subject to collectibility. An uncollectible check will render the application and any document issued pursuant thereto invalid. A charge of $5.00 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn.

NOTE: *Attach all correspondence in your possession relating to your deportation*

BEST AVAILABLE COPY

GPO 899-221